# STATE OF MICHIGAN

# COURT OF APPEALS

| | |
|---|---|
| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>May 29, 2001 |
| v | No. 220567<br>Genesee Circuit Court |
| DARIN JEROME BASS,<br><br>Defendant-Appellant. | LC No. 98-003481 |

Before: K. F. Kelly, P.J., and O'Connell and Cooper, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of second-degree home invasion, MCL 750.110a(3); MSA 28.305(a)(3), and was sentenced as an habitual offender, second offense, MCL 769.10; MSA 28.1082, to a term of four-and-a-half to twenty-two-and-a-half years' imprisonment. He appeals as of right, and we affirm.

Defendant first argues that he was denied due process where the trial court's determination of defendant's guilt was based, in part, on a clearly erroneous factual finding. In a bench trial, the trial court must make specific factual findings. MCR 6.403. We review those factual findings for clear error. MCR 2.613(C); *People v Lester*, 232 Mich App 262, 271; 591 NW2d 267 (1998).

Defendant argues that one of the court's findings was contrary to the evidence. The evidence presented at trial indicated that the victim's home had a broken window with blood on the window sill. Two white towels with blood on them were found near the home, and police officers saw a suspect flee the area carrying a towel. When defendant was found by police officers, he had blood on his hands. The victim testified that the towels were similar to ones that he had recently purchased. Defendant testified that he cut his hand changing a tire outside an acquaintance's house, which was across the street from the victim's home. Defendant claimed that his acquaintance, Melvin Nappier, gave him a towel or two to wrap around his hand. Nappier testified that he gave defendant a white towel for his hand, which defendant took with him when he left. The trial court's findings included the following statement:

> I want to comment further about Melvin Nappier's testimony. I find Mr. Nappier [sic] testimony to be less than credible, although it is somewhat revealing in certain respects. Mr. Nappier gave an account of giving Mr. Bass a towel, and

> coincidentally it was a white towel that matched the description of the towel that was taken from [the victim's] house. He related giving Mr. Bass the towel to tend to his wound. But there are two circumstances here that don't fit the situation that's found from the evidence. He relates one towel being given to Mr. Bass in his house, and Mr. Bass depositing the towel in Mr. Nappier's bathroom. The facts are that there were two white towels and the towels were left on the trail of the flight.

Defendant complains that the trial court erred by finding that Nappier testified that defendant left the towel in the bathroom. Defendant is correct. Nappier's testimony was that defendant took the towel with him. However, this erroneous factual finding does not require reversal. Defendant insists that he was denied due process because the trial court's determination of guilt was based, in part, on this erroneous factual finding. However, our review of the record reveals that the trial court's verdict did not depend on this erroneous finding. The trial court, in denying defendant's motion for a new trial, stated as follows:

> Defendant was convicted upon strong circumstantial evidence. First, the police saw Defendant run from the scene of the crime. He then fled from the police. The police found Defendant hiding in a garage in a roll of carpet. Defendant also had a camera on his person. When the film was devoloped [sic] it showed pictures of the family that lived in the house from which the police chased Defendant. . . . Further, the argument that the Court incorrectly discounted one of the defense witnesses is without merit in face of other compelling circumstantial evidence.

Thus, the trial court's verdict did not depend on the erroneous factual finding. Due process requires that the prosecutor prove the defendant's guilt beyond a reasonable doubt. *In re Winship*, 397 US 358, 364; 90 S Ct 1068; 25 L Ed 2d 368 (1970). The trial court's verdict must be supported by evidence sufficient to allow a rational trier of fact to conclude that the essential elements of the crime were proved beyond a reasonable doubt. *People v Nunez*, 242 Mich App 610, 615; 619 NW2d 550 (2000). After reviewing the record, we conclude that the evidence was sufficient to support the trial court's verdict. Due process was satisfied. Therefore, the trial court's single factual error in its extensive factual findings was harmless.

Next, defendant argues that the trial court improperly considered prior, dismissed criminal charges when sentencing defendant. At sentencing, the trial court made the following remarks:

> Mr. Bass, it's my duty to inform your of the reasons for the Court's sentence.
>
> I shared the same sentiment that the prosecutor has expressed when I read this report. I read the first couple of paragraphs and I saw it leading to a prison term. And then it recommends probation. Frankly, I don't see, Mr. Bass, that you're—that probation is appropriate under the circumstances.

> And the reason I say that is that I, first of all, begin with your history. You were previously on a probationary sentence in 1989. You violated probation in 1990. And you were sentenced to a term of 40 to 60 months in prison. You were subsequently paroled on that charge in 1994 and—excuse me, you were paroled in 1992. You were discharged from parole in '94, and in '94 you were again placed on a probationary term. *You have several Assault and Battery charges that I see were dismissed*. However, in April of '96 you had an Assault and Battery for which a jail term of 40 days was imposed. You've got a Possession of Marijuana conviction, Resisting and Obstructing a Police Officer, and now Home Invasion in the Second Degree.
>
> It seems to me that you've been on probation; that hadn't worked. I don't see any point in repeating what has been a failed effort in the past.

According to defendant, the italicized remark illustrates that the trial court improperly considered dismissed charges when fashioning a sentence. However, taken in context, it is clear that the court did not rely on those dismissed charges. The court stated that defendant had been placed on probation, violated probation, and after being discharged from parole for the probation violation, was convicted of assault and battery, drug possession, and resisting a police officer. Thus, the court concluded that past efforts to rehabilitate defendant through probation had failed. The court specifically recognized that several assault and battery charges had been dismissed. Moreover, at defendant's motion for resentencing, the trial court denied relying on the dismissed charges when fashioning defendant's sentence.

Where there was ample support for the trial court's conclusion that probationary efforts had failed, and where the trial court specifically denied relying on the dismissed charges, defendant has not affirmatively shown that the trial court relied on improper information. Absent such an affirmative showing, we will not presume that the trial court considered improper information simply because the information was before the court. *People v Alexander*, 234 Mich App 665, 672; 599 NW2d 749 (1999).

Finally, defendant argues that the trial court should have stricken reference to the dismissed charges from the presentence investigation report. However, the trial court granted defendant's post-trial motion for correction of the presentence report. Although the trial court's opinion only referred to uncounseled convictions, its order simply granted defendant's motion, which sought removal of uncounseled convictions and dismissed charges from the presentence report. "A court speaks through written judgments and orders rather than oral statements or written opinions." *People v Jones*, 203 Mich App 74, 82; 512 NW2d 26 (1993). Thus, by its order, the trial court granted defendant the relief he sought. This issue is therefore moot. See *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998).

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Peter D. O'Connell
/s/ Jessica R. Cooper